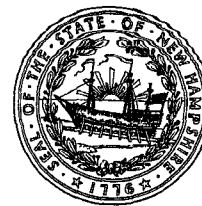




The State of New Hampshire  
**Department of Environmental Services**



Michael P. Nolin  
Commissioner

Barton and Elizabeth Green  
140 Maple Street  
Andover, NH 03216

Shaun Hathaway  
Lost Cloud Forest Management LLC  
585 Gilman Pond Road  
Newport, NH 03773

Richard A. Lyons, Jr.  
Richard A. Lyons, Jr. Logging and Landclearing  
18 Dodge Hill Road  
Bennington, NH 03442

Re: Wetlands Bureau File # 2006-1066  
140 Maple Street, Andover, NH

**ADMINISTRATIVE ORDER**  
**No. WD 06-033**

July 18, 2006

**A. INTRODUCTION**

This Administrative Order is issued by the Department of Environmental Services, Water Division to Barton and Elizabeth Green, Lost Cloud Forest Management LLC, and Richard A. Lyons, Jr. pursuant to RSA 482-A:6 and RSA 485-A:22. This Administrative Order is effective immediately upon issuance.

**B. PARTIES**

1. The Department of Environmental Services, Water Division ("DES"), is a duly constituted administrative agency of the State of New Hampshire, having its principal offices at 29 Hazen Drive, Concord, New Hampshire.
2. Barton and Elizabeth Green are individuals having a mailing address of PO Box 404, Andover, New Hampshire 03216.
3. Lost Cloud Forest Management LLC ("Lost Cloud") is a limited liability company with a mailing address of 585 Gilman Pond Road, Newport, NH. Shaun Hathaway is the managing member of Lost Cloud.
4. Richard A. Lyons, Jr. is an individual with a mailing address of 18 Dodge Hill Road, P.O. Box 12, Bennington, NH 03442. Mr. Lyons is the day-to-day operator and subcontractor for Lost Cloud.

**P.O. Box 95, 29 Hazen Drive, Concord, New Hampshire 03302-0095**

Telephone: (603) 271-2147 • Fax: (603) 271-6588 • TDD Access: Relay NH 1-800-735-2964

DES Web site: [www.des.nh.gov](http://www.des.nh.gov)

5. Barton and Elizabeth Green, Lost Cloud, and Richard A. Lyons, Jr. are hereinafter collectively referred to as "the Responsible Parties."

### C. STATEMENT OF FACTS AND LAW

1. RSA 482-A authorizes DES to regulate dredging, filling, and construction in or on any bank, flat, marsh, wetland, or swamp in and adjacent to any waters of the state. Pursuant to RSA 482-A:11, I the Commissioner of DES has adopted Env-Wt 100 *et seq.* to implement this program.
2. RSA 482-A:3, I states that "[no] person shall excavate, remove, fill, dredge or construct any structures in or on any bank, flat, marsh, or swamp in and adjacent to any waters of the state without a permit from [DES]."
3. RSA 482-A:14, III provides that "[f]ailure, neglect or refusal to comply with [RSA 482-A] or rules adopted under [that] chapter, or an order or condition of a permit issued under [RSA 482-A], and the misrepresentation by any person of a material fact made in connection with any activities regulated or prohibited by [RSA 482-A] shall be deemed violations of RSA 482-A."
4. Pursuant to RSA 485-A:17, DES regulates significant alteration of terrain and erosion control through a permit program. Pursuant to RSA 485-A:6, VIII, DES has adopted NH Administrative Rules Env-Ws 415 to implement this program.
5. Pursuant to NH Admin. Rule Env-Ws 1703.11, turbidity in Class B waters shall not exceed naturally occurring conditions by more than 10 nephelometric turbidity units ("NTUs"). Highland Lake is a Class B water.
6. Barton and Elizabeth Green are the owners of land located on 140 Maple Street, Andover, NH, more particularly described on Town of Andover Tax Map 17 as Lot 120 ("the Property").
7. On April 18, 2006, the Town of Andover signed the NH Department of Revenue Notice of Intent to Cut Wood or Timber for the Property ("the Notice"). The Notice lists Lost Cloud as the logger/forester responsible for cutting and for following applicable timber harvest laws. The Notice was signed by Shaun Hathaway.

#### May 2006 Violations:

8. On May 4, 2006, DES received a report that brown, turbid water was flowing into Highland Lake from a tributary running under Maple Street.
9. On May 4, 2006, DES personnel from the Watershed Management Bureau responded to the report. DES personnel followed the source of the turbidity upstream and found that it originated from an on-going logging operation on the Property.
10. On May 4, 2006, DES personnel collected turbidity samples from the stream that is the tributary to Highland Lake. A background turbidity sample collected measured 20.8 NTUs. A turbidity sample collected downstream of the logging operation measured 272 NTUs.

11. On May 4, 2006, the NH Department of Resources and Economic Development, Division of Forests and Lands, ("DRED") issued an Official Notice to Lost Cloud. The Official Notice required Lost Cloud to immediately cease and desist operations for a "non-permitted stream crossing. Failure to comply with BMPs [best management practices] for soil erosion resulting in siltation entering a tributary to Highland Lake. Cease and desist use of crossing until it is permitted by DES and brought into compliance with BMPs."

12. On May 5, 2006, Shaun Hathaway left a voice mail message for DES personnel. The voice mail stated that hay bales and silt fence had been installed within the intermittent stream in an attempt to control the turbidity. He further stated that his "subcontractors never should have been in that section," and that he was "horrified by what he saw." He also stated that this "was his job and his responsibility."

13. On May 8, 2006, DES personnel conducted an inspection of the property and observed or found the following:

- a. A poled ford had been installed within an intermittent stream channel. The logs were sunk in mud and silt. Standing water, mud and silt extended for at least 50 feet in both directions, rendering the crossing useless and ineffective. A row of hay bales had been staked downstream of the crossing within the stream channel;
- b. Upstream of the first crossing, the skid trail was in the stream itself for a distance of at least 300 feet. Water was flowing down the skid trail until it was diverted into the original stream channel by some felled hemlocks;
- c. Further upstream, the skid trail eventually left the stream channel and rutted a forested wetland for at least 100 feet with ruts measuring 12 inches deep;
- d. Downstream from the poled ford to Highland Lake, a distance of approximately 1,600 feet, water was flowing clear at the time of the inspection; however, sediment measuring 6 inches deep was observed within the stream channel; and
- e. No permits were observed posted at the landing.

14. DES records show that a Notification of Forest Management or Timber Harvest Activities Having Minimum Wetlands Impact had not been filed for the Property.

15. At the field inspection, Richard Lyons, Jr. acknowledged that he was the operator and was working for Lost Cloud. Mr. Lyons stated that he had no formal contract between himself and Mr. Hathaway as to who was responsible for compliance with best management practices ("BMPs"), but it was understood that Mr. Hathaway would file for any needed permits.

16. On May 9, 2006, DES received a Notification of Forest Management Activities Having Minimum Wetlands Impact for the Property from Lost Cloud.

### June 2006 Violations:

17. On June 13, 2006, DES received a report that brown, turbid water was flowing into Highland Lake from Tilton Brook. DES personnel responded to the report and found that it originated from the same logging operation, but in a different area of the Property.

18. On June 13, 2006, DES personnel collected turbidity samples from upstream from the logging operation and at the point where Tilton Brook flows into Highland Lake. A background turbidity sample collected upstream of the logging operation measured 0.31 NTUs. The turbidity sample collected at the point where Tilton Brook flows into Highland Lake measured 19.5 NTUs. The distance from the June logging impacts to Highland Lake is approximately one mile.

19. On June 13, 2006, DRED issued an Official Notice to Shaun Hathaway. The Official Notice required Mr. Lyons to cease and desist for "Failure to comply with BMPs [best management practices] resulting in siltation leaving skid trails and entering Tilton Brook. Cease and desist use of skid trail on western property line until it is brought into compliance with BMPs."

20. On June 14, 2006, DES personnel inspected the Property and observed or found the following:

- a. Three poled fords had been installed within intermittent stream channels. The poled fords had been overtopped with sediment and water. Sediment and water flowed out of the skid trails and into Tilton Brook;

- b. Water and sediment were observed running off the skid trails in three other locations. The sediment and water was observed flowing directly into two beaver ponds and associated scrub-shrub wetlands; and

- c. No erosion controls were observed on site.

21. On June 19, 2006, DES received a sediment and erosion control plan from Mr. Hathaway. DES approved the plan on or about June 22, 2006.

22. On June 26, 2006, Mr. Lyons met with DES personnel to state that because of the recent rain, it was too wet to start the restoration. Mr. Lyons called DES personnel approximately every other day to update DES personnel on the status of the restoration.

23. On July 6, 2006, DES received a telephone call from Mr. Hathaway stating that the skid trail had been stabilized and that the restoration should be complete by July 11, 2006.

24. On July 11, 2006, DES received numerous complaints that the tributary that was the subject of the May 2006 inspection was again running brown, resulting in turbidity to Highland Lake. DES received three voice mail messages from Mr. Hathaway stating that the turbidity was caused by sheet runoff from the landing and adjacent skid trails.

#### D. DETERMINATION OF VIOLATIONS

##### May 2006 Violations:

1. The Responsible Parties have violated Env-Ws 1703.11 by exceeding the naturally occurring conditions of a Class B surface water by more than 10 NTUs in May 2006.
2. The Responsible Parties have violated RSA 482-A:3 by dredging approximately 300 linear feet of intermittent stream channel.
3. The Responsible Parties have violated RSA 482-A:3 by dredging an additional 100 linear feet of intermittent stream channel by failing to properly install and maintain a poled ford.
4. The Responsible Parties have violated RSA 482-A:3 by disturbing a minimum of 200 linear feet of intermittent stream channel downstream of the poled ford by allowing sediment to be deposited into the stream.
5. The Responsible Parties have violated RSA 482-A:3 by dredging or rutting approximately 1,500 square feet of wetland without a permit.
6. The Responsible Parties have violated Env-Wt 304.05 by failing to comply with *Best Management Practices for Erosion Control on Timber Harvest Operations in New Hampshire*, specifically by:
  - a. Failing to plan, locate and flag skid trails and surface water and wetland crossings in advance, thereby minimizing crossings to wetlands and surface waters;
  - b. Failing to install a crossing device such as a corduroy or geotextile while crossing a forested wetland; and
  - c. Use of poled ford during periods of high flow.

##### June 2006 Violations:

7. The Responsible Parties have violated Env-Ws 1703.11 by exceeding the naturally occurring conditions of a Class B surface water by more than 10 NTUs in June 2006.
8. The Responsible Parties have violated Env-Wt 304.05 by failing to comply with *Best Management Practices for Erosion Control on Timber Harvest Operations in New Hampshire*, specifically by use of poled ford during periods of high flow and failure to maintain poled fords after becoming overtopped with water.

#### E. ORDER

Based on the above findings, DES hereby orders the Responsible Parties have as follows:

1. **Immediately cease and desist** all activities on the Property, except as necessary to stabilize

the Property pursuant to this Order.

2. **By July 31, 2006**, submit to DES for approval an erosion and sediment control plan for the Property. The erosion and sediment control plan shall be prepared by a Certified Professional in Erosion and Sediment Control (CPESC) and include the following:

- a. Existing conditions and land topography, with dimensions drawn to scale, including the delineated footprint of all wetlands, streams, ponds, and jurisdictional runoffs on the Property.
- b. A detailed proposed means of sediment and erosion control (silt fence, haybales, mattings, *etc.*);
- c. A proposed schedule, restoration, and construction sequence listing equipment and methods for accomplishing restoration as well as an anticipated restoration compliance date; and
- d. A detailed proposed planting plan for the reestablishment, stabilization, and re-vegetation of the restoration areas.

3. Retain a CPESC to supervise the implementation of the restoration and to submit the restoration progress reports prepared in accordance with Item E.2 above.

4. Implement the erosion and sediment control plan proposed in accordance with Item E.2, above only after receiving written approval from, and as conditioned by, DES.

5. Send correspondence, data, reports, and other submissions made in connection with this Administrative Order, **other than appeals**, to DES as follows:

Linda Magoon, Compliance Specialist  
DES Water Division  
29 Hazen Drive - P.O. Box 95  
Concord, NH 03302-0095  
Fax: (603) 271-6588  
e-mail: [lmagoon@des.state.nh.us](mailto:lmagoon@des.state.nh.us)

#### F. APPEAL

Any person aggrieved by determinations D. 1. and D. 7. this Order may appeal to the New Hampshire Water Council by filing an appeal that meets the requirements specified in Env-WC 200 within 30 days of the date of this Order. Copies of the rule are available from the DES Public Information Center at (603) 271-2975 or at <http://www.des.state.nh.us/desadmin.htm>.

Any person aggrieved by determinations D. 2, D. 3, D. 4., D. 5., D. 6., or D. 8. of this Order may request that DES reconsider this determination within 20 days of the date of the Order. The request for reconsideration must comply with Env-Wt 203.01(d) (copy attached), and will be processed in accordance with Wt 203.01(e)-(j). Any party not satisfied with the decision on

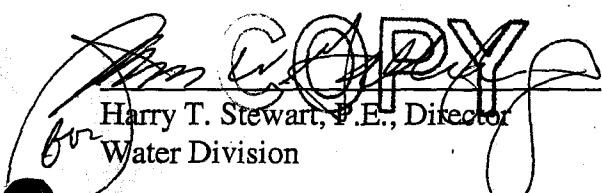
reconsideration may appeal to the Wetlands Council. Please note that under RSA 482-A:10, II, the Council may not consider any ground that is not set forth in the request for reconsideration.

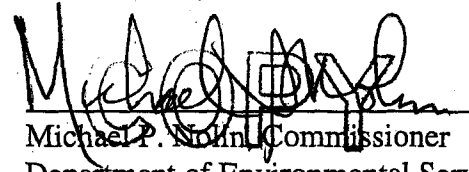
Filing an appeal or request for reconsideration of the Order will not automatically relieve the Responsible Parties' of their obligation to comply with the Order.

#### G. OTHER PROVISIONS

Please note that RSA 485-A:22 and RSA 482-A:13 and 482-A:14 provide for administrative fines, civil penalties, and criminal penalties for the violations noted in this Order, as well as for failing to comply with the Order itself. The Responsible Parties are obligated to comply with all applicable requirements. DES will continue to monitor the Responsible Parties' compliance with applicable requirements and will take appropriate action if additional violations are discovered.

This Order is being recorded in the Merrimack County Registry of Deeds so as to run with the land.

  
Harry T. Stewart, P.E., Director  
Water Division

  
Michael P. Nolin, Commissioner  
Department of Environmental Services

CERTIFIED MAIL # 7005 0390 0001 8439 6221  
# 7005 0390 0001 8439 6238  
# 7005 0390 0001 8439 6122

cc: Gretchen R. Hamel, Legal Unit Administrator  
James P. Martin, Public Information Officer, DES  
Jody Connor, DES Biology Bureau  
Andy Chapman, DES Watershed Bureau  
Jennifer J. Patterson, Sr. Asst. Attorney General, NHDOJ/EPB  
Linda Magoon, DES Wetlands Bureau  
Town of Andover Board of Selectmen and Conservation Commission  
Doug Miner, DRED, Division of Forests and Lands